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Supreme Court of the United States

OCTOBER TERM, 1948

No. 507

CITY OF OMAHA, a Municipal Corporation, CHARLES W. LEEMAN, Mayor, PAUL HAZE, Chief of Police, et al.,

Petitioners,

vs.

FRANK BROTHERS FOOTWEAR, INC.,

Respondent.

BRIEF ON BEHALF OF BEST & CO., INC., AS *AMICUS CURIAE*, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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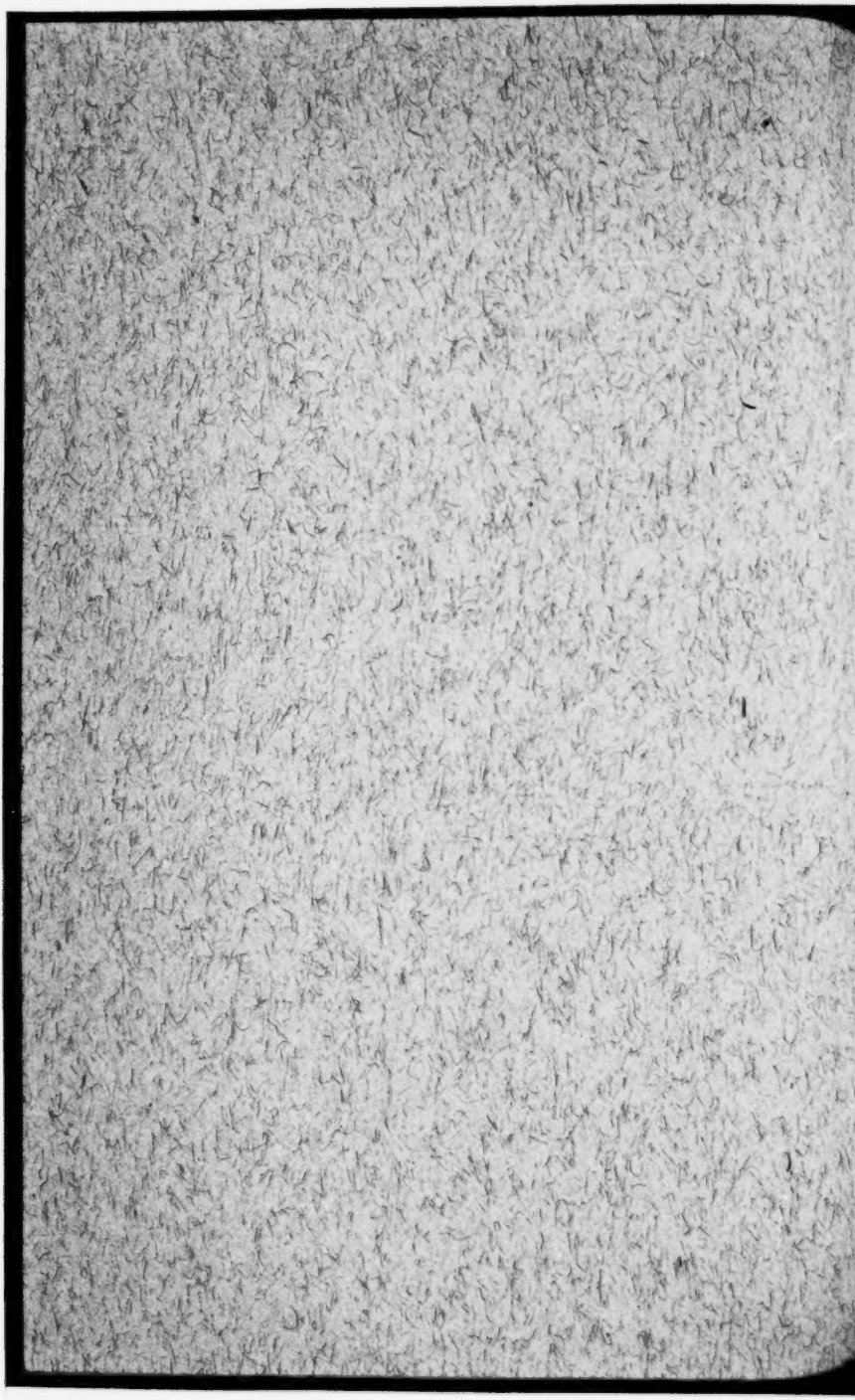

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BRIEF ON BEHALF OF BEST & CO., INC., AS *AMICUS CURIAE*, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI [1]

Opinions of the Courts Below

The opinion delivered in the Supreme Court of Nebraska is reported in 149 Neb. 888, 33 N. W. (2d) 161. It consists only of a statement that "This case is controlled by Best & Co., Inc. v. City of Omaha" (R. 94), which latter decision (R. 77-94) was concurrently rendered and is reported in 149 Neb. 868, 33 N. W. (2d) 150. The plaintiff therein is the *amicus curiae* herein.

There was no dissent from either opinion.

A motion for rehearing was denied without opinion (R. 95-98).

In the District Court of Douglas County, the court of first instance, no opinion was delivered. (The decree of that Court appears at R. 38-41.)

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[1] The written consent of all parties to the case to the filing of this brief has been filed herein, pursuant to Rule 27 (9).

Jurisdiction

The validity of certain ordinances of the City of Omaha relating to "itinerant merchants" is drawn in question by the final decree of the Court below on the ground of their being repugnant to the Constitution of the United States, and the decision is against their validity. The petitioners now apply for a writ of certiorari pursuant to Title 28, U. S. C., 1948 ed., § 1257.

Statement of the Case

The Nature of the Challenged Ordinances [2]

Solely because respondent "does not intend to conduct (its) business in the City of Omaha for a period of longer than one hundred twenty days" and "does not maintain a regular place of business in Omaha for the conduct of retail trade" it is required by the ordinances, in order to display samples in a hotel room or elsewhere for the sole purpose of securing orders (concededly in furtherance of interstate sales at retail), to comply with the following:

1. Apply in writing for a license to the City Council, which shall conduct a "hearing thereon" in order to "inquire into the character of the applicant and of the solicitors or agents named by him and into the character of the goods, wares and merchandise to be handled";

2. If such approval is obtained, to have each solicitor "personally appear" before the City Clerk;

3. Pay a fixed-sum "occupation tax" of $15 a day;

4. Pay a license fee of $1 for each solicitor;

[2] The ordinances are set forth at R. 6-15.

5. Deposit a surety bond in the sum of $5,000, "conditioned to indemnify any purchaser * * * against loss or damage by reason of misrepresentation as to the kind, quality, or value of the said goods, wares, or merchandise";

6. Furnish "a health certificate by a * * * physician licensed to practice * * * within the state of Nebraska, certifying that the licensee and all employees connected with such business are free from any contagious or infectious disease".

Local retail merchants are subject to neither an occupation tax (in a fixed sum or otherwise), nor any license, health, or surety bond requirements for the privilege of, or as a condition precedent to, their displaying samples or effecting sales.

The Facts [3]

Respondent, a New York corporation, is engaged in the retail sale of shoes. It has no store or other place of business, officer or agent in Omaha or anywhere else in the State of Nebraska and it is not domesticated in that State (R. 66-67).

It rented a room in a hotel in Omaha, where for a period of two days it displayed samples of some of its merchandise to prospective customers, who were local residents invited by notices previously mailed from respondent's New York office. The articles on display were merely samples, which were exhibited to obtain orders for goods corresponding to the samples for future shipment in interstate commerce. No merchandise was sold or delivered, and none was offered or available for that purpose (R. 67-68).

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[3] The case was tried on an agreed statement (R. 79); the stipulations of fact appear at R. 65-75.

The orders were taken subject to acceptance or rejection at respondent's office in New York, to which point all orders were forwarded. Those which were accepted were filled by shipment of the merchandise from New York direct to the customers by mail or through other regular channels of interstate commerce. The orders required and contemplated interstate deliveries for their fulfillment. No merchandise was sent to respondent's representative who conducted the display, and in no instance did he make, handle, or aid the delivery thereof to the customer (R. 68).

No payment or deposit on account of the purchase price was made or received at the time of the display. Invoices were sent from New York direct to the customers, who remitted payments to respondent's New York office (R. 68).

It is undisputed that the respondent's activities in Omaha were directed solely to the solicitation of orders for the purchase of goods to be shipped interstate, and that only interstate sales resulted therefrom.

That the merchandise is a legitimate subject of interstate commerce sales is also conceded.

The ordinances provide that it is unlawful to engage in any activities for which a license is required without first obtaining a license, and impose criminal penalties for a violation thereof (R. 6-9, 13, 14).

The defendants threatened that, if respondent attempted to display its samples again in Omaha, its representative would be criminally prosecuted (R. 20, 68).

Respondent thereupon brought suit to enjoin enforcement of the ordinances against it on the ground that they were repugnant to the Commerce Clause and other provisions of the Constitution of the United States (R. 1-6; 67).

The Trial Court dismissed the complaint (R. 38-41).

The Supreme Court of Nebraska unanimously reversed the decree (R. 77-94), and denied a motion for rehearing (R. 95-98).

Respondent Solicits Orders in Omaha Infrequently, and Not Continuously and Regularly

The undisputed facts, as found by the Court below, are as follows:

> "Such displays have occurred only infrequently, never more than two in any one year, and never for a longer period of time than two days on any one occasion" (R. 82).[4]

There is nothing in the record to support petitioners' assertion that the sample displays and solicitation of orders in Omaha occur with "regularity and continuity" (Br., p. 20). On the contrary, the representative of respondent who conducts its exhibits there is a New York resident (R. 48, 57), and he is not regularly engaged in solicitation in Omaha. The evidence is not even that he conducts exhibits there twice a year or even every year. It is that he "never" held "more" than two exhibits in Omaha in any year and that "never" did any exhibit last longer than two days. That is the maximum.

Irrespective of the yardstick used, respondent's activities in Omaha are not continuous and regular throughout the year, but are limited in frequency and duration, and are casual and spasmodic.

Discriminatory Aspects of the Ordinances

To a large degree, petitioners have jerry-built their case upon an assumption (and it is nothing more substantial than an assumption) that the decision of the Court below affords respondent tax exemption not enjoyed by resident retail merchants of Omaha and that it deprives the municipality of sorely needed revenue (Pet. and Br., pp. 3-4, 11-12, 19).

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[4] The stipulation of facts actually goes beyond the finding of the Court; it reads: "Such displays have never been held regularly or continuously in Omaha by the plaintiff, but occur only infrequently, never more than twice in any one year and never for a longer period than two days on any one occasion" (R. 68; see also R. 71).

The facts are diametrically the opposite.

Regular retail merchants in Omaha, including those who compete with respondent for the sale of similar merchandise, are expressly exempted from the application and reach of the ordinances. (Each member of the intervening associations comes within that specially privileged category (R. 72, 73).) They are subject to *no* occupation tax, and to *no* license, surety bond, or health requirements (R. 65, 68-69).

They do not pay any sales, use, income, or other similar taxes. They pay only real property taxes on their stores, if they own them, and personal property taxes on their stocks of goods. The imposing amount of taxes stated by petitioners to have been paid by the members of the intervening associations (Br., p. 19) represent only property taxes on what they own. It contains no tax for the privilege of soliciting orders or of making sales. Consequently their argument that the ordinances only tend to equalize the tax burdens as between resident and non-resident merchants is specious. What they overlook is that extra-state merchants must pay those same property taxes if they own real or personal property in Omaha on the assessment date (R. 65-66, 74), and that respondent is also subject to property, franchise, and many other taxes in its home State of New York (R. 66).

If Omaha needs taxes (there is no proof of it in the record and, in any event, its need for revenue is not in issue), why does it not extend the ordinances to cover its regular retail merchants and impose upon them license or privilege taxes similar to those it seeks to exact from respondent.

Moreover, the City of Omaha does not exact any taxes from the other tenants (permanent and transient, business and private) of the hotel in Omaha in which respondent conducts its occasional exhibit there. So far as the other tenants are concerned, the City takes the position that the taxes paid by the owner of the hotel cover all municipal

services and facilities afforded the property, irrespective of the character of its occupancy.

As for the provisions of the ordinances that are not productive of taxes, they serve no purpose save to place traps, inconveniences and red tape in the way of out-of-state merchants to discourage them from sending "drummers" to Omaha. For example, after the City Council has conducted an investigation, held a hearing, and approved the application for license, the applicant must still make a personal appearance before the City Clerk to get the license. And no application will be entertained by the City Council unless accompanied by a health certificate issued by a local physician. This means that before an exhibit can be held, an applicant must personally go in advance to Nebraska to submit to a physical examination, then make the application to the City Council, which does not act thereon until five to fifteen days later (R. 7), then appear in person or be otherwise represented before the Council at its hearing (R. 7-8), and finally, upon obtaining the Council's approval, attend again before the City Clerk.

Significantly, these so-called "police" provisions, allegedly designed to "protect" the people of Omaha, do not contain any similar protective measures in respect of local merchants, irrespective of their state of health and that of their employees, irrespective of their financial responsibility or lack of it, and irrespective of their character, the nature of their merchandise, or their selling methods.

Summary of the Holding of the Court Below

The gist of the Court's opinion on the merits is, in its own language, as follows:

> "A review of the stipulated facts in the instant case shows that the appellants' activities in the city of Omaha were confined exclusively to soliciting orders for the sale of goods in another state which contemplated and necessarily required interstate shipment for their fulfillment. They constituted an integral part of interstate commerce and not a local or intra-

state act separable therefrom and subject to taxation or licensing by the city of Omaha, especially as provided for by the ordinances in question" (R. 93-94).

"The ordinances are discriminatory and unreasonable, in violation of the commerce clause of the Constitution of the United States which prohibits discriminatory regulation of interstate commerce, whatever may be its form or method. The ordinances challenged in this case are a clear attempt to regulate interstate commerce" (R. 93).

Summary of Argument

The ordinances contravene the Commerce Clause. This Court has stricken down all State and municipal legislation that has come before it that endeavored to impose, as here, a burdensome and discriminatory fixed-sum tax on the solicitation of orders for the purchase of goods to be shipped interstate. Directly arrayed against the position of the petitioners herein is an unbroken line of decisions extending over a period of more than half a century, starting with *Robbins* v. *Shelby Taxing District,* 120 U. S. 489 (decided in 1886), and continuing right up to the present time with *Best & Co.* v. *Maxwell,* 311 U. S. 454 (decided in 1940), and *Nippert* v. *Richmond,* 327 U. S. 416 (decided in 1946). The *Best & Co.* case is in all material respects identical with the instant case, and the attempted distinction sought to be drawn by petitioners is inaccurate and ineffectual (Points I and II).

The decisions upon which petitioners base their argument that the "drummer cases" are outmoded and no longer the law as applied to the factual situation herein involved, are inapplicable. The same argument has several times been held by this Court to be untenable (Point III).

Petitioners' contention that the ordinances do not unduly burden interstate commerce is refuted by the fact that the tax alone (even without taking into account the bond, health and other features) is in excess of many of the

taxes invalidated by this Court. Nor can the ordinances be sustained under the police power (Point III, subs. B and C).

All the remaining questions presented by petitioners are non-federal questions and in any event were correctly decided upon State grounds adequate to sustain them (Point IV).

POINT I

The decision in this case that the ordinances, as applied to respondent, contravene the Commerce Clause is in accord with and controlled by numerous applicable decisions of this Court.

The ordinances as applied to respondent fasten their grip directly and solely on interstate commerce by requiring a license and exacting a fixed-sum privilege tax for its transaction. Moreover, discrimination against interstate commerce, and not equality, is the very core of the ordinances and results from their practical operation. Legislation of that character has uniformly been held invalid by this Court.

Nippert v. *Richmond,* 327 U. S. 416;
Best & Co. v. *Maxwell,* 311 U. S. 454;
Real Silk Mills v. *Portland,* 268 U. S. 325;
Davis v. *Virginia,* 236 U. S. 697;
Stewart v. *Michigan,* 232 U. S. 665;
Rogers v. *Arkansas,* 227 U. S. 401;
Crenshaw v. *Arkansas,* 227 U. S. 389;
Dozier v. *Alabama,* 218 U. S. 124;
Rearick v. *Pennsylvania,* 203 U. S. 507;
Norfolk & West. Ry. Co. v. *Sims,* 191 U. S. 441;
Caldwell v. *North Carolina,* 187 U. S. 622;
Stockard v. *Morgan,* 185 U. S. 27;
Brennan v. *Titusville,* 153 U. S. 289;

Stoutenburgh v. *Hennick,* 129 U. S. 141;
Asher v. *Texas,* 128 U. S. 129;
Corson v. *Maryland,* 120 U. S. 502;
Robbins v. *Shelby Taxing District,* 120 U. S. 489.

See also:

Crutcher v. *Kentucky,* 141 U. S. 47;
Lyng v. *Michigan,* 135 U. S. 161;
Leloup v. *Port of Mobile,* 127 U. S. 640;
Welton v. *State of Missouri,* 91 U. S. 275.

The law on this subject is so firmly intrenched that more than thirty years ago Mr. Justice Holmes considered it "established"[5] And since then it has been reaffirmed on eight occasions.

Not only has the principle become rooted in our law, but it was specifically applied by this Court to the *identical* state of facts involved herein. In *Best & Co.* v. *Maxwell, supra,* the *amicus curiae* herein was the appellant. The display of samples in that case took place in Winston-Salem, North Carolina, and recovery of tax paid under protest was the relief prayed for, whereas in this case the exhibit occurred in Omaha and an injunction against enforcement of the ordinances was sought. Aside therefrom, there is not so much as a hair's difference between the two cases.

That factor may explain, in some measure, why certiorari is being sought only in the instant case (wherein Frank Brothers Footwear, Inc., is the plaintiff) and not in the companion *Best & Co.* case.[6]

The decision of the Court below is also in harmony with the unanimous decisions rendered by the Courts of last

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[5] *Rearick* v. *Pennsylvania, supra,* at p. 510.

[6] The time within which to apply for certiorari in the companion *Best & Co.* case has expired, and consequently the decision of the Court below in that case, adverse to the petitioners herein (who are also the defendants and interveners therein), is now final.

resort of other States. *State* v. *Yetter* (an employee of Best & Co.), 192 S. C. 1, 5 S. E. (2d) 291; *State of Louisiana* v. *Best & Co.*, 194 La. 918, 195 So. 356.

It is likewise in accord with an earlier decision of the Nebraska Court of first instance in which the case at bar was tried.[7] Decisions to the same effect involving Best & Co. or its representatives have been rendered by Courts in Arkansas, Florida, Michigan, Missouri, Ohio, Oklahoma, Pennsylvania and Virginia.[8]

POINT II

The attempted distinction that petitioners seek to draw between *Best & Co.* v. *Maxwell* and the case at bar is both inaccurate and ineffectual.

The petitioners do not assert (nor could they) that there is even the slightest difference between the activities of the respondent herein in Omaha and those of Best & Co. in Winston-Salem involved in the *Maxwell* case, which this Court found constituted interstate commerce within the purview and protection of the Commerce Clause.

Instead, they say that the *Maxwell* case involved "patent discrimination against interstate commerce", whereas here there is "no distinction between residents or non-residents, intrastate or interstate operations" (Br., p. 18).

The fact is that, just as in the instant case, the North Carolina statute involved in the *Maxwell* case, as Mr. Justice Reed held, "nominally" taxed "all who are not regular

[7] In 1926 the representative of the *amicus curiae* herein was convicted of violating ordinances of the City of Omaha similar to those challenged in the instant case. On appeal to the District Court for Douglas County, Nebraska, the complaint was dismissed, the Court holding that Best & Co.'s business "was exclusively interstate commerce" and that the ordinances were "unconstitutional and void". The decision is unreported.

[8] The decisions are not officially reported.

retail merchants in North Carolina, regardless of whether they are residents or non-residents". But that did not save the statute, because in its practical operation it was found to be discriminatory in that payment of the tax "required of out-of-state retailers but not of their real local competitors, can operate only to discourage and hinder the appearance of interstate commerce in the North Carolina retail market" (pp. 456-457).

The very same criticism, or even stronger, can be accurately leveled at the Omaha ordinances challenged herein.

That not one member of the two intervening associations of retail merchants pays any occupation or privilege tax, in a fixed-sum or otherwise, gives a fairly clear indication of whether the ordinances are intended to discriminate.

The Omaha ordinances are, if anything, more onerous than was the North Carolina statute held invalid in the *Maxwell* case. The latter exacted $250 a *year*. The Omaha tax is $15 a *day, plus* a license fee of $1 for each solicitor, *plus* a $5,000 surety bond, *plus* medical certificates from a Nebraska physician, *plus* an appearance at a hearing before the City Council, *plus* a personal appearance before the City Clerk.

The North Carolina statute at least went through the form of imposing a fixed-sum license tax of $1 a year on local merchants. In Omaha not even that pretense is observed. Additionally, North Carolina merchants also paid, besides real and personal property taxes, income, franchise, and sales taxes, none of which is paid by local merchants in Omaha.

In short, the distinction claimed by petitioners between the *Maxwell* case and the instant case can be recognized only (to paraphrase Mr. Justice Frankfurter [9]) if a distinction without a difference makes a difference.

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[9] *MacGregor* v. *Westinghouse Co.*, 329 U. S. 402, 415.

POINT III

The authority of the "drummer cases", as applied to the factual situation herein involved, is unimpaired. The ordinances cannot be sustained on any of the other grounds asserted by petitioners.

The very same contentions as are made by petitioners herein were made and held to be without merit in both *Best & Co.* v. *Maxwell* and *Nippert* v. *Richmond, supra.*

We do not therefore believe it to be necessary or appropriate to answer each of the points mentioned in their labored argument, especially since they cite cases recklessly and indiscriminately and without regard to their facts and their holdings. Many of the cases cited and quoted from do not stand for the propositions for which they are cited, and others are authority for precisely the converse. Incomplete and fragmentary excerpts are taken from their context to suggest a meaning not conveyed by, or at variance with, the decision itself. And a considerable part of the brief consists, in effect, of elaborate shadow boxing with non-existent opponents; the points discussed in them are neither controversial nor in any way applicable.

We shall accordingly confine ourselves to their principal contentions, which will suffice to show the frivolous nature of the petition.

A

The cases cited by petitioners are inapplicable.

The petitioners cite no direct authority in support of the validity of the ordinances or of their contention that the rule of *Robbins* v. *Shelby Taxing District, supra,* is outmoded or inapplicable herein. We pointed that out in the Court below, and in their motion for rehearing petitioners stated at page 27 of their brief as follows:

> "But we are challenged to point out that *Robbins* v. *Shelby County Taxing District, supra,* and its sequelae have been overruled. We acknowledge our inability to do so."

That not one of the "drummer cases" has ever been overruled or even criticized, as applied to the factual situation herein involved, and that they have been consistently cited with approval, petitioners ascribed in the Court below to this Court's idiosyncrasy". Now petitioners, being before another tribunal, take the position that the Court below in its opinion "does not mention" some of the cases upon which they rely; from that they apparently seek to infer that the cases were overlooked or, to use petitioners' own picturesque language, the Court "turned a blind eye" on them (Pet. and Br., pp. 7, 8, 28).

What actually transpired in the Court below, as its opinion clearly discloses, was that petitioners argued a "new trend" was started by *Western Live Stock* v. *Bureau,* 303 U. S. 250, and followed by several other so-called leading cases. Each of the cases thus relied upon was separately reviewed and distinguished in the opinion, which makes it clear that the Court's observations were not confined to the particular cases specifically mentioned, but encompassed all those named by petitioners. So many were cited by them that it would have been impractical, as well as wholly unnecessary, to give separate consideration to each in the opinion.

In any event, not one of the cases to which petitioners now refer involves the application of the principle of the "drummer cases" to a fixed-sum privilege tax on the solicitation of orders in interstate commerce.

Memphis Natural Gas Company v. *Stone,* 335 U. S. 80, does not, as petitioners herein assert;[10] purport to overrule, criticize, or depart from the "drummer cases". As the opinion expressly states, it relates solely to "the field of pipeline taxation". Both *Best & Co.* v. *Maxwell* and *Nip-*

[10] Pet. and Br., pp. 7, 8, 9, 28-29.

pert v. *Richmond* are cited therein. That decision, as we read it, stands for the proposition that a tax upon the permanent maintenance within a state of a substantial pipeline and compressor stations is not within the inhibition of the Commerce Clause, especially where (as there) the tax was not discriminatory as it was also levied on all Mississippi corporations.

Independent Warehouse v. *Scheele,* 331 U. S. 70, involved a tax "on the business of the storage of personal property in a warehouse engaged in storing goods for hire". It does not enunciate any legal doctrine that is applicable to the instant case. It follows the principle stated in *Minnesota* v. *Blasius,* 290 U. S. 1, namely, that when goods have come to rest and acquired an intra-state situs, they are subject to local non-discriminatory taxation.

Joseph v. *Carter & Weekes Co.,* 330 U. S. 422, involved a New York City excise tax on the gross receipts of a stevedoring corporation engaged wholly within the territorial limits of the City in loading and unloading vessels moving in interstate commerce. In holding the tax to be invalid, this Court stated, at page 433, as follows:

> "Although state laws do not discriminate against interstate commerce or in actuality or by possibility subject it to the cumulative burden of multiple levies, those laws may be unconstitutional because they burden or interfere with commerce. See *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 767. Stevedoring, we conclude, is essentially a part of the commerce itself and therefore a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by those gross receipts, is invalid."

Freeman v. *Hewit,* 329 U. S. 249, held that an Indiana gross income tax could not constitutionally be applied to receipts from securities sales effected by an Indiana fiduciary on the New York Stock Exchange. The two excerpts from the prevailing opinion quoted on page 24 of petitioners' brief illustrate how incomplete quotations may be slanted to give the opposite effect from that contained in

the decision. The first quotation consists of only a portion of a sentence, it is immediately followed by the sentence hereinbelow quoted (which petitioners omitted), namely:

> "To deny to a State a particular source of income because it taxes the very process of interstate commerce does not impose a crippling limitation on a State's ability to carry on its local function" (p. 253).

The two quotations are one and one-half pages removed from each other; in the portion of the opinion preceding the second quotation, appears the following:

> "It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause. Of course a State is not required to give active advantage to interstate trade. But it cannot aim to control that trade even though it desires to control its own. It cannot justify what amounts to a levy upon the very process of commerce across States lines by pointing to a similar hobble on its local trade. It is true that the existence of a tax on its local commerce detracts from the deterrent effect of a tax on interstate commerce to the extent that it removes the temptation to sell the goods locally. But the fact of such a tax, in any event, puts impediments upon the currents of commerce across the State line, while the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce" (p. 254).

Richfield Oil Corp. v. *State Board,* 329 U. S. 69, did not involve the Commerce Clause, but was concerned with the constitutional provision prohibiting imposts or duties on imports and exports. Under that clause a California tax was invalidated. *Best & Co.* v. *Maxwell* is cited at page 76.

As far as *Nippert* v. *Richmond, supra,* is concerned, it is little less than ludicrous for petitioners to cite it in support of their contention. That decision squarely condemns

ordinances of the character challenged herein, holds that the "drummer cases" have not been overruled by the recent decisions of this Court, and distinguishes many of the decisions upon which petitioners rely. In referring to the very type of tax here in question, the Court held:

> "It may be, as the Court said in the *Berwind-White* case, that the State is free to allow its municipal subdivisions to erect such barriers against each other, to some extent, as to the commerce over which the State has exclusive control. It cannot so outlaw or burden the commerce of the United States."

B

Ordinances exacting smaller taxes have been invalidated.

Petitioners argue that the occupation tax in question does not impose an undue burden and that higher taxes have been upheld (Pet. and Br., pp. 8-9, 33). None of the cases to which petitioners refer involved a tax on the solicitation of orders for interstate commerce.

Even without considering the bond, health and other onerous burdens imposed by the Omaha ordinances, the tax alone is larger than many of the taxes that were stricken down by this Court in the cases cited in Point I, *supra*. The following are some of such taxes:

Case	*Amount of Tax*
Robbins v. *Shelby Taxing District*	$10 a week or $25 a month.
Corson v. *Maryland*	$15 a year and up, graduated according to stock on hand.
Asher v. *Texas*	$35 a year.
Brennan v. *Titusville*	$1.50 a day, $5 a week, $10 for 3 months, and $25 a year.
Stockard v. *Morgan*	$20 a year.
Caldwell v. *North Carolina*	$10 a year.
Real Silk Mills v. *Portland*	$12.50 quarterly and $500 bond.

C

The ordinances cannot be sustained under the police power.

Petitioners assert that the ordinances constitute a legitimate exercise of the municipality's police power (Pet., p. 9). That argument has been answered by this Court, which has held that a tax on the solicitation of interstate sales cannot be sustained under either the taxing or police powers. *Freeman* v. *Hewit, supra; Brennan* v. *Titusville, supra.*

POINT IV

The remaining questions presented by petitioners are non-federal in nature, and were correctly decided below.

A

Dismissal of petitions in intervention.

Petitions to intervene, filed by two associations of local retail merchants (R. 18-19), were dismissed by the Court below, which held that, under a Nebraska statute, the associations did not have an adequate interest in the litigation to qualify for intervention, and that "The rule to which this jurisdiction is committed is: 'When public officers are engaged in litigation to protect public rights, and their pleadings and procedure maintain the public interest, no private person is entitled to intervene.'"

Question 9 presented by the petition herein is whether intervention by the associations was "justified" (p. 6). Petitioners do not claim that the action of the Court below violated any provision of the federal constitution.

The associations are in the inconsistent position of asserting on one hand that they have been deprived of the status of interveners and not allowed to present their case, and on the other hand that they are not interlopers and are entitled to file a petition for certiorari herein.

The associations do not assert that the defendants or their counsel are incompetent or unwilling to protect any rights which the City of Omaha may have or that they have been derelict in discharging their public duties or responsibilities. They do not mention a single step that they were precluded from taking, or argument as to the merits that they were unable to advance or that was not heretofore or is not now being put forward.[11]

This is a simple issue of State practice and procedure, based on local laws.

B

Granting injunctive relief.

The Court below directed the issuance of a permanent injunction restraining the defendants from enforcing the ordinances against respondent (R. 94). It held that, under Nebraska statutes and decisions, injunctive relief was the proper procedural remedy herein, and that because respondent and the *amicus curiae* herein (the appellants in the Court below) "could test the regularity of the ordinance and its amendment by subjecting their representative to criminal prosecution and by having their business and property rights interfered with is not a sufficiently adequate remedy to preclude" injunctive relief (R. 87).

Question 10 presented by the petition herein is "whether an injunctive remedy is available to respondent" (R. 6). The claim is not that issuance of the injunction contravened any provision of the federal Constitution, but only whether discretion should have been exercised in favor of granting it (Br., p. 35).

Matters affecting the remedy are governed by the law of the forum. Like the preceding question, this involves nothing but State law. Even if the question were cognizable in this Court, it is no longer an open one, having

[11] The interveners were permitted to file answers (R. 21-36), participate in the trial (R. 69-75), and they also filed a brief and their counsel presented oral argument in the Court below.

been clearly answered in *Real Silk Mills* v. *Portland*, 268 U. S. 325; *Terrace* v. *Thompson*, 263 U. S. 197, 214; *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 386.[12]

C

Whether the appeal in the Court below was moot.

The final question posed by petitioners is whether the appeal became moot in the Court below and should have been dismissed (Pet. and Br., pp. 7, 11, 36). A formal motion for such relief was made there by petitioners (R. 46-60) and overruled; in its opinion the more than adequate grounds therefor, as well as the contentions of petitioners, are so clearly set forth (R. 83-85) as to make a restatement thereof superfluous here.

A State Court is the judge of its own jurisdiction (*Seattle & Renton Ry.* v. *Linhoff*, 231 U. S. 568, 570), and, in any event, there is no claim by petitioners that any rights which they may have under the federal Constitution were invaded by the decree of the Court below. Moreover, this cause presents a real dispute, and an actual, acute controversy. Nothing has transpired since the inception of the litigation to indicate that the defendants have relaxed or changed their admitted intention of enforcing the invalid ordinances against respondent, the *amicus curiae* herein, and any and all others who endeavor to exercise their right to solicit orders in Omaha for interstate fulfillment, with consequent multiplicity of criminal prosecutions of their representatives and irreparably injurious interference with their respective businesses.

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[12] Petitioners herein cite *Beal* v. *Missouri Pacific R. Co.*, 312 U. S. 45, in which federal equity jurisdiction was sought to be invoked to enjoin a criminal prosecution in a state court under a state law. This Court held that "The federal courts are without jurisdiction to try alleged criminal violations of state statutes. The state courts are the final arbiters of their meaning and appropriate application" (pp. 49-50).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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